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No. _____

In The

Supreme Court of the United States

October Term, 1992

PATRICK T. MURPHY,
Cook County Public Guardian,

Petitioner,

v.

B.H., *et al.*, by their next friend,
SUSAN TONE PIERCE, individually and on
behalf of all others similarly situated,

and

STERLING M. RYDER, Director of the
Illinois Department of Children and Family Services,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit erred in applying the party-only appeal rule to deny review, thereby sanctioning the district court's refusal to consider the significant federalism concerns related to the consent decree which settled a class action against the director of Illinois' child welfare agency. These federalism concerns were raised by the state court which has *parens patriae* responsibility for the children affected by the decree, through the attorney and guardian *ad litem* the state court had appointed to represent the children, who was twice denied party status prior to the entry of the decree.

LIST OF PARTIES

The parties to the proceedings below, who are the respondents herein, were Sterling M. Ryder (and his predecessors Sue Suter, Jess McDonald and Gordon Johnson), Director of the Illinois Department of Children and Family Services ("DCFS"), and Susan Tone Pierce, the next friend appointed by the district court for the plaintiff class. The Pierce respondent will be referred to as the American Civil Liberties Union ("ACLU") because it was the ACLU that brought the case below as counsel for a class of abused and neglected children, all of whom are also under the *parens patriae* power of the Illinois courts. Petitioner is the Public Guardian of Cook County, Illinois, who, through 71 lawyers and 25 social workers, represents as attorney and guardian *ad litem*, virtually all abused and neglected children in the largest county in Illinois by virtue of appointment by the state court.

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Petition For A Writ Of Certiorari
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For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, the Cook County Public Guardian, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on January 14, 1993.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 984 F.2d 196 and is reprinted in the appendix hereto, *infra* p. 1a.

JURISDICTION

In 1988, the ACLU filed an action on behalf of a class of children who had been adjudicated abused and neglected by the state courts and placed by those state courts under the custody or guardianship of the Illinois Department of Children and Family Services ("DCFS"). The ACLU asserted that various DCFS actions violated the rights of the class to adequate and safe placements under the Fourteenth Amendment, 42 U.S.C. § 1983 and the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-28, 670-79(a), and requested declaratory and injunctive relief against the DCFS director. The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1343, 2201 and 2202. On May 30, 1989, the district court ruled that the ACLU had stated valid claims under the Fourteenth Amendment and under the case plan and case review requirements of the Adoption Assistance and Child Welfare Act.

In August, 1990, the ACLU and DCFS accepted the district court's suggestion that they work toward settlement with the help of court-appointed experts, and settlement proceeded pursuant to Federal Rule of Evidence 706. A consent judgment was entered in this cause on December 20, 1991.

The Cook County Public Guardian, who has been appointed by the state court to represent the vast majority of the class of children whom the ACLU represented in the district court, moved to intervene in this cause on two occasions, in September, 1990, and in April, 1991. The district court denied the September, 1990 motion to intervene on November 17, 1990, and the Public Guardian did not appeal. The district court, and later the United States Court of Appeals for the Seventh Circuit, decided that the Public Guardian moved to intervene in April, 1991 "on essentially the same grounds offered in his first motion." (App. 4a). The district court denied the second motion to intervene, and when the Public Guardian appealed, the Seventh Circuit dismissed that appeal for lack of jurisdiction on July 8, 1991, holding that the Public Guardian should have appealed the first denial in November, 1990. (App. 4a, 5a; the order of the Court of Appeals for the Seventh Circuit is reprinted in the appendix hereto, *infra*. p. 10a).

After the Seventh Circuit dismissed the appeal for want of jurisdiction, and after a proposed consent decree had been distributed, on September 30, 1991, the Presiding Judge of the Juvenile Court of Cook County issued an order "pursuant to its *parens patriae* power, [directing] its appointed attorney and guardian *ad litem* for the wards of [the] court, the Cook County Public Guardian, to ask the Honorable John Grady, of the United States District Court," for specific relief in the decree to alleviate the Presiding Judge's concerns that the decree usurped his legitimate authority. (The Presiding Judge's order is reprinted in the appendix hereto, *infra* p. 13a). In particular, the state court asked the federal court to "[i]nclude a

provision specifying that nothing in the decree is meant to preclude state court judges from exercising their inherent judicial responsibilities over wards of the court as a class or in any other way." Acting pursuant to the directions of the state court, the Public Guardian then filed a Motion to Expand Distribution of Notice and to Request an Evidentiary Hearing and Continuance of the Fairness Hearing (App. 5a, 7a) and presented the Presiding Judge's order to the district court as part of that motion.

The district court entered a consent decree which ignored the state court's federalism concerns. The Public Guardian then appealed the district court orders denying his motions to intervene and also "the district judge's orders entering the consent decree and denying his motions to compel discovery, to expand distribution of notice and to request an evidentiary hearing and continuance of the fairness hearing." (App. 5a). He did not seek to intervene a third time for purposes of appeal.

On January 14, 1993, the United States Court of Appeals for the Seventh Circuit dismissed the petitioner's appeal for lack of jurisdiction "on grounds of untimeliness and because, with respect to the decree, he lacks standing to challenge the district court's rulings." (App. 2a).

The Public Guardian concedes, for purposes of this Petition, that the Seventh Circuit correctly dismissed his appeals of the two motions to intervene. The sole issue before this Court is whether the Public Guardian, as a representative of the *parens patriae* of a majority of the class members, the Circuit Court of Cook County, and as the state court-appointed attorney and guardian *ad litem*

of the children, has standing to challenge the consent decree entered by the district court in spite of the fact that he did not file and lose a third motion to intervene.

This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In this case the federal district court ignored serious issues of federalism which were raised by the state court, as *parens patriae* of a majority of children in the plaintiff class, whose rights were profoundly affected by the district court's entry of a consent decree. This case presents the important issue of whether the party-only appeal rule should be applied to deny review to a representative of the state court who, acting pursuant to an order of the state court, seeks to raise serious federalism concerns about a consent decree which adversely affects the *parens patriae* authority of the state courts over the plaintiff class of children, when the nonparty did not move to intervene for a third time for purposes of appealing the consent decree.

Respondent DCFS's interest in silencing the Public Guardian, as voice of the Cook County, Illinois juvenile court, is clear. The Presiding Judge of the Juvenile Court of Cook County, pursuant to his authority as *parens patriae*, had entered a series of orders against the DCFS official whom the state courts appoint as guardian of abused and neglected children who are wards of the court. These orders, which curtailed abuses of power by DCFS and protected the wards of the court, were upheld

by the Illinois appellate courts. *See In re V.H.*, 197 Ill. App. 3d 52, 554 N.E.2d 686, *appeal denied*, 133 Ill. 2d 557, 561 N.E.2d 709 (1990); *In re Lehman*, 186 Ill. App. 3d 592, 542 N.E.2d 754 (1989). Subsequently, DCFS and the ACLU agreed to enter into a consent decree which in part protects DCFS from some systemic suits brought at the direction of the state court judge, as *parens patriae*, or by the children's attorney and guardian *ad litem* appointed by the state court until at least 1999.

The Presiding Judge of the Juvenile Court of Cook County believed that the proposed decree greatly reduced the state court's power to act as *parens patriae* and to enter orders for the protection of the 31,000 children who are the wards of the state court. Thus, after the Seventh Circuit dismissed the Public Guardian's appeal of the denial of his second motion to intervene in July, 1991, the Presiding Judge of the Juvenile Court entered an order directing the Public Guardian to appear before the district court to ask the district court to insure that certain provisions were included in the decree to prevent any limitations on the state court's *parens patriae* authority. Specifically, after a hearing at which both respondents were present and were heard (App. 13a), the state court entered an order

> pursuant to its *parens patriae* power, [directing] its appointed attorney and guardian *ad litem* for the wards of this court, the Cook County Public Guardian, to ask the [United States District Court] to:
>
> A. Include a provision specifying that nothing in the decree is meant to preclude state court judges from exercising their inherent

judicial responsibilities over wards of the court as a class or in any other way.

B. Specify that the consent decree is not meant to preclude the attorney and guardian *ad litem* appointed by the Juvenile Court of Cook County from taking any action which he believes is necessary to protect the interests of his clients against DCFS on an individual, group or class basis, or in any other way.

C. Limit the broad language at pages two, nine and ten, which attempts to summarize the relief in the decree, to clarify that the decree resolves all issues pertaining solely to the internal bureaucracy of DCFS, which are within the executive authority of DCFS, but does not attempt to usurp the authority of the state court to supervise the actions of DCFS, as court-appointed guardian.

D. Clarify that the decree is not meant to limit plaintiffs from seeking systemic relief against DCFS in any state or federal court on issues which are not specifically resolved in the consent decree.

The district court failed to address the Presiding Judge's federalism concerns. Specifically, the district court refused to expand distribution of the notice of settlement, to compel discovery, to conduct an evidentiary hearing or to continue the fairness hearing on the contested consent decree. After the decree was entered without the protections sought by the state court, the petitioner, acting pursuant to the directions given to him by the state court, appealed the district court's order, along with the district court's previous denial of his two

unsuccessful motions to intervene. Despite the serious issues of federalism already ignored by the district court, the Seventh Circuit disposed of the Public Guardian's appeal on jurisdictional grounds, stating that

> because [the Public Guardian] is not a party in this case and has failed to intervene successfully, he has no standing to now challenge the district court's order entering the consent decree or its denial of motions to expand distribution of notice, to compel discovery or to request an evidentiary hearing and a continuance of the fairness hearing.

(App. 7a).

The Presiding Judge of the Juvenile Court of Cook County, Illinois, through the court-appointed attorney and guardian *ad litem*, attempted to raise the questions of federalism which exist because the plaintiff class consists of children who are under the protection of the state court. The district court ignored the concerns by entering the consent decree, seriously undermining state court authority. The Court of Appeals also refused to address this usurpation of state court authority by the federal court by holding that the Public Guardian had no standing to appeal.

Each member of the plaintiff class is a child who has been taken from the custody of his or her parents by order of the state courts of Illinois. The overwhelming majority of these children live in Chicago, and are thus wards of the Circuit Court of Cook County, Illinois. The state courts have placed these children in the care of a state agency, DCFS, pursuant to state law. 750 ILCS 405/2-10, 2-27, formerly Ill. Rev. Stat. ch. 37, pars. 802-10,

802-27. Nevertheless, the state court continues to act as the superior guardian of the children by virtue of its authority as *parens patriae*. The State of Illinois, like other states, has reposed the *parens patriae* power to protect abused and neglected children in its circuit courts.

> The jurisdiction which was exercised in this case stems from the responsibility of government, in its character as *parens patriae*, to care for infants within its jurisdiction and to protect them from neglect, abuse and fraud . . . Historically exercised by courts of chancery . . . it is "of ancient origin" . . . That ancient equitable jurisdiction was codified in our Juvenile Court Act. . . .

People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, 773, *cert. denied*, 344 U.S. 824 (1952) (internal citations omitted). After due notice and a hearing, in which the children's biological parents were found to have abused or neglected them, the Juvenile Court of Cook County thus became the actual legal parent of the vast majority of the members of the plaintiff class. The state court then entrusted its wards to the care of DCFS. As court-appointed guardian, DCFS is an officer of the state court. *See* 39 Am. Jur. 2d *Guardian and Ward* § 62 (1968). "A guardian appointed by a court of competent jurisdiction is always under the court's control and subject to its direction and supervision . . . The jurisdiction of the court in this respect is exclusive and a continuing one." 39 C.J.S. *Guardian and Ward* § 7 (1976).

The Cook County Public Guardian is appointed by the Chief Judge of the Circuit Court of Cook County and holds office at the pleasure of the Chief Judge. "The trial court appoints [the Public Guardian] to represent persons

who are adjudged to be incompetent because of either age or physical or mental disability. A trial court appoints [the Public Guardian] in a case individually rather than the public guardian's office in general." *Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees*, 229 Ill. App. 3d 180, 593 N.E.2d 922, 924, *appeal denied*, 146 Ill. 2d 624, 602 N.E.2d 448 (1992). The Public Guardian "retains a fiduciary responsibility to all of the wards and he is accountable for every decision made in the office." *Id.*, 593 N.E.2d at 924.

"In the Juvenile Division, [the Public Guardian] represents juveniles in child abuse and neglect matters . . . The trial court appoints [the Public Guardian] to serve as a juvenile's guardian *ad litem* and attorney. . . . " *Id.*, 593 N.E.2d at 925. As the lawyer appointed for the abused and/or neglected child, the Public Guardian makes all litigation decisions for the child. *Id.* Moreover, as guardian *ad litem*, the Public Guardian "acts by the appointment of the court . . . and is subject to the orders and direction of the court. . . . " *Paskewie v. East S. L. & S. R. Co.*, 281 Ill. 385, 117 N.E. 1035, 1036 (1917). His duties toward a child may even encompass action on the child's behalf after a particular case is concluded. *Id.*

Pursuant to his appointment by the state court, acting as the lawyer for the abused and neglected children, the Public Guardian has represented his child-clients in a panoply of state appellate and supreme court cases as well as in actions filed in federal courts, which emanated from his representation of the children in the Juvenile Court. *See, e.g., Suter v. Artist M.*, ___ U.S. ___, 112 S. Ct. 1360 (1992), *rev'g* 917 F.2d 98 (7th Cir. 1990); *In re Dominique F.*, 145 Ill. 2d 311, 583 N.E.2d 555 (1991); *In re J.J.*, 142

Ill. 2d 1, 566 N.E.2d 1345 (1991); *In re M.M.*, 226 Ill. App. 3d 202, 589 N.E.2d 687 (1992), *appeal granted*, 145 Ill. 2d 634, 596 N.E.2d 629; *In re Walter B.*, 227 Ill. App. 3d 746, 592 N.E.2d 274 (1992); *In re B.T.*, 204 Ill. App. 3d 277, 561 N.E.2d 1269 (1990); *K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Aristotle P. v. Johnson*, 721 F. Supp. 1002 (N.D. Ill. 1989); *Christina W. and David J. v. Morgan*, No. 88 C 8383 (N.D. Ill.); *Doe v. Lambert*, No. 87 C 8150 (N.D. Ill.).

Although the ACLU represents the Public Guardian's clients in this case, and, as the Public Guardian concedes, his appeals of the denials of intervention were untimely, the Public Guardian's role cannot be discounted. He is the state court-appointed voice for most of the children who make up the class. The Public Guardian, through his 71 assistants and 25 social workers (51 assistants at the time the Public Guardian filed the motion for expanded distribution of notice and to request an evidentiary hearing and continuance of the fairness hearing), represents most of the children in the class on an individual basis in matters related to their care by the state court-appointed guardian – DCFS. Moreover, although the state court appointed DCFS as guardian, the state court retains final control over the child through its *parens patriae* authority.

The Seventh Circuit refused to reach the merits of the state court's federalism concerns, presented through the Public Guardian, about a consent decree which profoundly affects the wards of the state court. By dismissing the case for lack of jurisdiction, the Seventh Circuit avoided the serious questions of federalism presented by

the state court, which can be raised at any time and which demand consideration to insure the proper federal and state balance in the area of child welfare, in which both sovereigns have a significant interest. Relying on two cases which suggest that the Public Guardian should have filed a third motion to intervene for purposes of attacking the consent decree on appeal, the Seventh Circuit erroneously applied the party-only appeal rule to effectively silence the state court's federalism concerns.

REASONS FOR GRANTING THE WRIT

This appeal concerns the federal court's unjustified usurpation of legitimate state court authority through entry of a federal consent decree. On two occasions the district court refused to consider the objections of the attorney and guardian *ad litem* whom the state court appointed to represent the children who are the subject of the consent decree. The state court eventually entered an order specifically directing its appointed guardian *ad litem* and attorney for the children to appear before the district court to ask that court to insure that the *parens patriae* authority of the state court would be protected in the consent decree it was being asked to sanction. Still, the district court ignored the state court's entreaties. The Seventh Circuit likewise ignored the usurpation of legitimate state court authority by the consent decree when it dismissed the Public Guardian's post-judgment appeal on jurisdictional grounds:

> Because [the Public Guardian] is not a party in this case and has failed to intervene successfully, he has no standing to now challenge the district

> court's order entering the consent decree or its denial of motions to expand distribution of notice, to compel discovery or to request an evidentiary hearing and a continuance of the fairness hearing.

(App. 7a).

The opinion below states that because the Public Guardian failed to intervene successfully, he lacked standing to challenge the district court's order entering the consent decree or the district court's denial of his motions to contest the fairness of the proposed consent decree. The Seventh Circuit, relying upon this Court's decisions in *Marino v. Ortiz*, 484 U.S. 301 (1988), and *Karcher v. May*, 484 U.S. 72 (1987), effectively ruled that the Public Guardian, on behalf of the state court, should have sought to intervene on yet a third occasion for purposes of challenging the consent decree on appeal.

Karcher refers to the "general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." *Karcher v. May*, 484 U.S. 72, 77 (1987) (citations omitted). In *Marino*, this Court pointed out that the Second Circuit referred to exceptions to the general rule that may come into play " 'when the non-party has an interest that is affected by the trial court's judgment.' " 484 U.S. at 303 (citing *Hispanic Society of New York City Police Department v. New York City Police Department*, 806 F.2d 1147, 1152 (2d Cir. 1986), *aff'd sub nom. Marino v. Ortiz*, 484 U.S. 301 (1988)). This Court then stated, "We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." 484 U.S. at 303 (citation omitted). The Seventh Circuit has taken this sentence by the Court as a license to eliminate

the longstanding exceptions to the party-only appeal rule. Yet the question remains whether it is proper to ignore the serious issues of federalism and to foreclose the nonparty from litigating on behalf of his child-clients just because he did not follow the "better practice" of futilely seeking to intervene for the third time. The question of the continuing viability of the longstanding exceptions to the party-only appeal rule must be resolved by this Court to permit a review of the federal court's unjustified usurpation of state court authority by entry of a consent decree. This case presents to this Court the important question of whether the "general rule" against nonparty appeals must give way when a nonparty will be adversely affected by a federal consent decree, which unjustly usurps legitimate state court authority. By strictly applying the party-only appeal rule and ignoring its longstanding exceptions, the Seventh Circuit, like the district court, was able to use a technicality to avoid considering the difficult, delicate balance that must be maintained when a federal court becomes involved in a State's child welfare system.

I.

SUPREME COURT REVIEW IS NECESSARY TO CORRECT THE LOWER COURTS' EGREGIOUS FAILURE TO CONSIDER THE STATE COURT'S CONCERNS ABOUT A FEDERAL CONSENT DECREE WHICH USURPS THE STATE COURT'S POWER TO PROTECT THOUSANDS OF CHILDREN WHO ARE UNDER THE STATE COURT'S JURISDICTION.

The state and the federal governments both have a profound interest in the care and protection of children.

However, state courts are primarily responsible for deciding whether children have been abused or neglected, whether they can safely remain in the custody of their parents, and if not, who should be appointed as guardian to protect them. In Illinois, state courts usually appoint an employee of the state Department of Children and Family Services as temporary custodian and then as guardian of children whose parents have abused or neglected them.

The state court, in its role as *parens patriae*, retains responsibility as superior guardian to insure that the guardian protects the children whom the court committed to its care. The guardian is an officer of the state court, and is always under its supervision and control. Thus, the delicate balance between federal and state relations is seriously compromised when the guardian appointed by the state court enters into a federal consent decree with the children who are wards of the state court over the objection of the state court. Nevertheless, the federal courts at both the trial and appellate levels in this case refused to consider the state court's concerns, which were presented to the federal court by express order of the state court.

The vast majority of abused and neglected children in Illinois are adjudicated as such by the Cook County Juvenile Court pursuant to state law. In most cases, that court has appointed the Public Guardian of Cook County to act as guardian *ad litem* and attorney to make litigation decisions for the children. The Public Guardian serves pursuant to appointment of the Chief Judge of the Circuit Court of Cook County.

All of the members of the plaintiff class are children and most of them are infants and very young children. After the state court removed them from the custody of their parents, three entities were authorized to voice the interests of the members of the plaintiff class. The first is the state court which, pursuant to its *parens patriae* authority, acts as the ultimate guardian of the children. The second is the court-appointed guardian *ad litem* and attorney for the children, who, for most members of the plaintiff class, is the Cook County Public Guardian. The third entity is the children's state court-appointed guardian, DCFS. However, DCFS's voice cannot speak on behalf of the children in the federal court proceeding, because the director of DCFS was the defendant who was charged with violating their civil rights. The decisions of the federal courts to ignore the voices of the other two entities violated the most cherished principles of federalism. Further, the entry of a consent decree without the protections suggested by the state court set up a dangerous precedent whereby federal courts effectively become, particularly in post-adjudication matters, "super juvenile courts".

Federalism means federal intrusion on state sovereignty in the form of federal judicial actions which impinge on autonomous state political and judicial functions. *See* Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 Colum. L. Rev. 1796, n. 4 (1988); *see also, Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 107 (1984). In *Missouri v. Fiske*, 290 U.S. 18, 28 (1933), this Court held that Eleventh Amendment principles require federal courts to decline jurisdiction of cases brought by private parties if it

appears that the state is an indispensable party to enable the court to grant relief, and the state has not consented to be sued.

Federalism issues, by their nature, are so significant as to overcome technical barriers to review. Just as Eleventh Amendment issues not raised below may be considered for the first time on appeal, federalism issues not considered below may be considered when raised on appeal by a nonparty. The Court of Appeals is not free to disregard federalism concerns expressed by the state court through its appointed guardian *ad litem* but not considered by the district court.

In *Neuwirth v. Louisiana State Board of Dentistry*, 845 F.2d 553, 555 (5th Cir. 1988), the Court of Appeals pointed out that a federalism question not raised in the district court but raised for the first time in a letter sent to the circuit court a few days before oral argument was properly considered "because of the strong federalism concerns behind the [Eleventh] Amendment." Although a "party" raised the federalism question in *Neuwirth*, the court's explicit concern about the need for a full consideration of federalism whenever it is raised transcends party status.

The questions of federalism which permeate this case have never been discussed or ruled upon either by the district court or the United States Court of Appeals. The Court of Appeals refused to reach the federalism issue based on its strict and unwarranted adherence to the party-only appeal rule. The parties to the decree – the ACLU and DCFS – obviously could not be depended upon to raise the federalism implications in the decree

they have fashioned. If the state court's agent lacks standing to obtain review of the consent decree and related orders entered by the district court, no court will consider the very serious issues of federalism in this case. Hence the wisdom of a federal court intruding upon the *parens patriae* authority of the state court to protect the children of the state has gone unquestioned by any tribunal. This unbridled usurpation of state court authority cannot be permitted to stand.

The Seventh Circuit should have exercised jurisdiction to address the merits of the state court's federalism concerns regardless of the party-only appeal rule. The "better practice" set forth by this Court in *Marino* should not be relied upon to preclude review when federalism is at issue, particularly where the nonparty made two previous unsuccessful efforts to intervene to bring the federalism concerns to the attention of the district court.

This case presents an important vehicle to determine how many times the agent of the state court must seek leave to intervene in order to raise the state court's concern that a decree would abrogate the state court's *parens patriae* power. The Public Guardian was twice unsuccessful in his attempts to intervene in this case which was brought by the ACLU on behalf of the Public Guardian's clients and other children in Illinois. The Seventh Circuit dismissed as untimely the Public Guardian's appeal of the denial of his second motion to intervene. The Presiding Judge of the Juvenile Court in Cook County then ordered the Public Guardian to inform the federal court of his concerns regarding the decree. The state court expressly ordered the Public Guardian to ask the federal court to include certain provisions in the consent decree,

including a provision specifying that nothing in the decree is meant to preclude state court judges from exercising their inherent judicial responsibilities over wards of the court as a class or in any other way.

After the federal court refused to consider the state court's concerns and entered the consent decree without the requested protections, the Public Guardian appealed. The Seventh Circuit dismissed the appeal on jurisdictional grounds relying on the party-only appeal rule. As a result, the state court's concerns have gone unheeded. The consequences of this dismissal for federal/state relationships in the child welfare area – a federal decree without the requisite protections for the integrity of the state system – make it necessary that this Court grant certiorari to prevent the creation of a super federal Juvenile Court adjudicating day-to-day child welfare issues.

II.

THE EXTRAORDINARY NATURE OF THE USURPATION OF LEGITIMATE STATE COURT AUTHORITY BY THE FEDERAL CONSENT DECREE MAKES STRICT APPLICATION OF THE PARTY-ONLY APPEAL RULE UNACCEPTABLE IN THIS CASE.

This Court has consistently phrased the party-only appeal rule as a general rule. *See, e.g., Karcher v. May*, 484 U.S. 72, 75 (1987), and cases cited therein. Thus, this Court has recognized that the rule has longstanding exceptions which come into play mainly when the purpose of the rule is not served by denying appellate review. As one circuit judge succinctly explained:

> The rule embodies the generally valid assumption that non-parties, as to whom final decisions are not *res judicata*, do not have a sufficient interest in the controversy to lodge an appeal . . . But where the assumption that only parties are interested is not true and a non-party is aggrieved, [the Court is] free to exercise [its] constitutional and statutory jurisdiction.

Central South Carolina Chapter, Society of Professional Journalists v. United States District Court for the District of South Carolina, 551 F.2d 559, 566 (4th Cir. 1977) (Craven, J., concurring and dissenting); *cf. Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980) (despite general rule precluding appeals by party who receives all relief he has requested, in an appropriate case appeal may be permitted from adverse ruling collateral to merits by party who has prevailed). Thus, this Court has upheld the decision of the Court of Appeals where an enjoined nonparty appealed that portion of the lower court's decision concerning the nonparty. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100 (1969). This Court has also unquestionably accepted the right of a nonparty to appeal an adjudication of contempt. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 96 (1988).

The Courts of Appeal have frequently granted review pursuant to exceptions to the party-only appeal rule, and they continue to do so. In *Class Plaintiffs v. Seattle*, 955 F.2d 1268 (9th Cir.), *cert. denied sub nom. Hoffer v. Seattle*, 114 S. Ct. 408 (1992), the Ninth Circuit applied the exception that a nonparty who is enjoined or otherwise directly aggrieved by a judgment has standing to appeal. The Ninth Circuit permitted an appeal by a group of bond holders who were not class members but were enjoined

by the settlement from bringing parallel actions against the settling defendants based on the subject matter of the claims resolved by the settlement.

Courts have also found exceptions to the party-only appeal rule in extraordinary circumstances or where the appellant had participated in the district court even though not a party and the equities of the case weighed in favor of hearing the appeal. *See, e.g., Kenny v. Quigg*, 820 F.2d 665 (4th Cir. 1987) (nonintervening employee permitted to pursue appeal based on interest and participation in district court proceedings regarding employee stock ownership plan); *SEC v. Wencke*, 783 F.2d 829 (9th Cir.), *cert. denied sub nom. DeLusignan v. Gould*, 479 U.S. 818 (1986) (stockholder who participated but never moved to intervene has standing to challenge disgorgement proceedings in Court of Appeals); *Brown v. Board of Bar Examiners*, 623 F.2d 605, 608 (9th Cir. 1980) (state bar examiners and board of governors dismissed from action as improper parties have standing to appeal injunction by which they are bound).

A participating nonparty who is bound by a judgment rendered in a suit to which he was not a party of record has been described as a privy to the party on whose behalf he participates. 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.411[6] (2d ed. 1988); 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice*, ¶ 203.06 (2d ed. 1990). As a participating nonparty who is bound by the decree, the Public Guardian is entitled to appeal.

Moreover, the extraordinary circumstances surrounding this case are clear. The ACLU represents, on a class basis only, the 12,000 or so children represented by the Public Guardian individually and in some class actions as well, *see, e.g., Suter v. Artist M.*, ___ U.S. ___, 112 S. Ct. 1360 (1992), *rev'g* 917 F.2d 980 (7th Cir. 1990), both as attorney and guardian *ad litem*. The federal district court now acts in effect as *parens patriae* for the children for purposes of the consent judgment. The state court acts as *parens patriae* for the children for all purposes. Finally, the equities which weigh in favor of appellate jurisdiction in this case center on the Public Guardian's attempt to present, as ordered by the state court, serious federalism concerns about the decree.

In *United States v. Oakland*, 958 F.2d 300 (9th Cir. 1992), the court phrased the exceptions to the party-only appeal rule as follows: "It is occasionally possible for one who was not a party to the litigation in the trial court to appeal from the final judgment, but only after being granted leave to intervene for such purpose." This exceedingly narrow statement, which is the equivalent of the Seventh Circuit's ruling below, highlights the need for a writ of certiorari to clarify the continued viability of the long-standing exceptions to the party-only appeal rule.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner, Patrick T. Murphy, Public Guardian of Cook County, respectfully asks that this Court grant the writ of certiorari, vacate the opinion of the United States Court of Appeals for the Seventh Circuit and remand the case with directions to the United States Court of Appeals to resolve the serious issues of federalism raised in the appeal therein.

Respectfully submitted,

PATRICK T. MURPHY
Public Guardian of Cook County

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DATE: April 12, 1993

APPENDIX

APPENDIX

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 92-1136

B.H., C.H., J.E., C.Z., E.G., O.G., S.G., C.G., P.G. and A.G., by their next friend, Susan Tone Pierce, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

Patrick T. Murphy, Cook County Public Guardian,

Proposed Intervening Plaintiff-Appellant,

v.

Sterling M. Ryder, Acting Director of the Illinois Department of Children and Family Services,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 5599 – John F. Grady, *Judge.*

Argued September 14, 1992 – Decided January 14, 1993

Before Cudahy, Ripple, and Kanne, *Circuit Judges.*

Cudahy, *Circuit Judge.* Twice the Cook County Public Guardian, Patrick Murphy, sought to intervene in this action against the Director of the Illinois Department of Children and Family Services. Twice his motions were

denied. Now, after this court dismissed his appeal of the second denial of intervention and after the two original parties entered a consent decree that the district judge approved as fair, reasonable and adequate, Mr. Murphy appeals both district court orders denying his motions to intervene and also challenges the fairness and adequacy of the consent decree. We dismiss Mr. Murphy's appeal for lack of jurisdiction on grounds of untimeliness and because, with respect to the decree, he lacks standing to challenge the district court's rulings.

I.

The Department of Children and Family Services (DCFS) is the state agency responsible for providing protective and welfare services to abused and neglected children and their families. The plaintiffs here – a class of all children who have been or will be in the custody of the DCFS and placed by it somewhere other than with their biological parents – filed suit in June of 1988 seeking declaratory and injunctive relief against the Director of DCFS.[1] They asserted that various DCFS actions violated their right to adequate and safe placements and care under the Fourteenth Amendment, 42 U.S.C. § 1983 and the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-28, 670-79(a).

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[1] The Director at the time of the action, Sue Suter, was sued in her official capacity. She has since been replaced by Acting Director Sterling M. Ryder, who accordingly takes her place in this action.

On May 30, 1989, the district court granted in part and denied in part DCFS's motion to dismiss the action. *B.H. v. Johnson*, 715 F. Supp. 1387 (N.D. Ill. 1989). Specifically, the court held that the plaintiffs stated valid claims under the Fourteenth Amendment for violations of their constitutional right "to be free from arbitrary intrusions upon their physical and emotional well-being while directly or indirectly in state custody, and to be provided with adequate food, shelter, clothing, medical care, and minimally adequate training to secure these basic constitutional rights." *Id.* at 1405. The court also determined that the plaintiffs set forth a proper claim for violations of the Adoption Assistance and Child Welfare Act's case plan and case review requirements, but dismissed the plaintiffs' equal protection claims, their due process claims for violation of state statutory provisions and their remaining substantive due process claims. *Id.*

After extensive discovery over the course of two years, the parties agreed in August 1990 to the district judge's suggestion that they work toward settlement with the help of court-appointed experts who would assess DCFS's procedures and recommend improvements. The settlement process, conducted pursuant to Federal Rule of Evidence 706,[2] culminated in the consent decree, which the district court approved on December 20, 1991. This document imposes detailed requirements upon the DCFS

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[2] Rule 706 allows the court to appoint expert witnesses. On August 31, 1990, the court entered an agreed order appointing 13 experts to review ten substantive areas of the lawsuit and two people to manage the process.

in areas ranging from case management and case planning to assessments and accountability.

Mr. Murphy, meanwhile, was not satisfied with how the case was proceeding. He contended that his status as guardian *ad litem* for thousands of children in the juvenile court system gave him a substantial interest in the proceedings and justified his participation. Under the Juvenile Court Act of Illinois, a guardian *ad litem* must be appointed upon the filing in state court of a petition alleging child abuse or neglect, Juvenile Court Act § 2-17, Ill. Rev. Stat. ch. 37, § 802-17 (1990), and Mr. Murphy serves in that role in the Cook County juvenile court system. In September 1990 he filed a motion to intervene in this case, complaining that the counsel for the plaintiffs' class were inadequately representing them. The district court denied the motion, holding that Mr. Murphy failed to demonstrate a direct interest or to explain why his expertise was essential to resolution of the case. The court also based its denial on timeliness grounds, noting that intervention at that stage in the settlement process "would clearly be disruptive." Transcript of Proceedings of Nov. 7, 1990, at 9. Mr. Murphy did not appeal.[3]

Mr. Murphy again moved to intervene on April 24, 1991, on essentially the same grounds offered in his first motion. When the district of court denied that motion, he appealed to this court, which dismissed the appeal for

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[3] Instead, Mr. Murphy sought to amend his complaint in another case, *K.H. v. Suter*, No. 87 C 9833 (N.D. Ill. 1987), an individual damages action that the Public Guardian brought on behalf of a DCFS ward. The district judge in that case denied leave to amend.

lack of jurisdiction on July 8, 1991. Mr. Murphy now appeals both district court orders denying his motions to intervene; he also challenges the district judge's orders entering the consent decree and denying his motions to compel discovery, to expand distribution of notice and to request an evidentiary hearing and continuance of the fairness hearing.

II.

We turn first to the timeliness of Mr. Murphy's appeal of the denial of his motions to intervene. Appeals must be filed within thirty days after the date of entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1). Mr. Murphy filed this appeal on January 16, 1992. Thus, this appeal's challenge of the district judge's November 7, 1990, denial of intervention – an immediately appealable order – is untimely. Similarly, Mr. Murphy's appeal of the denial (on April 26, 1991) of his second motion to intervene (a virtual carbon copy of the first) also is untimely. Even if the present appeal of the April 26, 1991, order were filed within the thirty-day time period, this court has already considered and dismissed that appeal in July of 1991 and Mr. Murphy cannot attempt to revive it now.

Mr. Murphy argues that the present appeal is not untimely because this court's July 1991 dismissal of his earlier appeal instructed him to wait until the end of the case. That contention is unfounded. We based that dismissal on the untimeliness of the appeal – namely, Mr. Murphy's improper attempt, by filing a virtually identical intervention motion, to circumvent his failure to appeal

the first motion's denial within the required time. *See* Order of July 8, 1991, at 2. An order denying intervention is final and appealable. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 513 (1950); *United States v. City of Oakland*, 958 F.2d 300, 302 (9th Cir. 1992); *see also* 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure: Civil 2d* § 1923, at 508 (1986 & Supp. 1991). By necessity such an order is subject to immediate review, because denial of intervention precludes the proposed intervenor's ability to appeal the later judgment (and at that time to challenge the earlier denial of intervention). *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 378 (1987); *City of Oakland*, 958 F.2d at 302. Although we noted in the order dismissing the appeal of July 1991 that parties can wait until the case's conclusion and appeal from the final decision, *see* Order of July 8, 1991, at 2, this option is limited to parties or successful intervenors; neither of these terms describes the Public Guardian. By definition, an order *denying* intervention cannot be appealed by a party or by a successful intervenor. Such an order is "interlocutory" in the sense that it is entered during the course of the litigation and prior to final judgment in the entire case; in all other respects, however, it is final and must be appealed within 30 days or not at all. We therefore lack jurisdiction to consider Mr. Murphy's untimely appeal of the denials of intervention.

Turning to Mr. Murphy's other complaints about the district court's rulings – most notably the court's approval of the consent decree – we find it unnecessary to reach the merits because Mr. Murphy, a non-party, lacks standing to challenge those rulings. As the Supreme

Court stated in *Marino v. Ortiz*, 484 U.S. 301 (1988), "[t]he rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Id.* at 304; *see also Karcher v. May*, 484 U.S. 72, 77 (1987) ("[W]e have consistently applied the general rule that one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom.") (citations omitted). In the context of consent decrees, we have stated more specifically that parties whose motions to intervene were properly denied "have no right to attack the fairness of the consent decree because they are not *parties* to the agreement." *United States v. City of Chicago*, 908 F.2d 197, 200 (7th Cir. 1990), *cert. denied sub nom. Feldman v. United States*, 111 S. Ct. 783 (1991). Because Mr. Murphy is not a party in this case and has failed to intervene successfully, he has no standing to now challenge the district court's order entering the consent decree or its denial of motions to expand distribution of notice, to compel discovery or to request an evidentiary hearing and a continuance of the fairness hearing.

Mr. Murphy's untimely appeal of the denial of his motions to intervene makes it unnecessary to determine whether those motions were properly denied. Even if we had jurisdiction to consider Mr. Murphy's requests for intervention, however, we would not be persuaded that the district court erred in denying those motions. Mr. Murphy sought to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure or, alternatively, to intervene permissively pursuant to Rule 24(b). Only abuse of discretion may upset the district court's denial of permissive intervention. In that respect, there are four relevant factors: timely application, an

interest relating to the subject matter of the action, potential impairment of that interest by disposition of the action and lack of adequate representation of the interest by the existing parties. *See Southmark Corp. v. Cagan*, 950 F.2d 416, 418 (7th Cir. 1991). Abuse of discretion is also the standard for evaluating the court's denial of intervention of right on grounds of untimeliness. *City of Chicago*, 908 F.2d at 199. Given the ample grounds for concluding that the case and the settlement negotiations had sufficiently progressed to warrant the district court's preclusion of interventions,[4] the district court did not abuse its discretion in denying intervention solely on grounds of timeliness. Thus, that conclusion justifies denial of Mr.

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[4] In the Transcript of Proceedings of Nov. 7, 1990, Judge Grady stated that

> [t]his is certainly not an ancient case, but I think timeliness has more to do with how much is over the dam by way of accomplishment in the case than it does the mere lapse of time. In this case, much has been accomplished, and at the suggestion of the Court, the parties have agreed upon a mechanism which could well result in the settlement of the case. . . .

He later continued:

> But, clearly, Mr. Murphy is not in sympathy with the plan of litigation which the Court and counsel have adopted in an effort to resolve the complex issues in this case in the most efficient manner possible. Intervention in that state of affairs would clearly be disruptive as far as that procedure is concerned. Therefore, the Court would be reluctant to permit intervention even if Mr. Murphy had a protectable interest and the representation of the class by existing counsel were inadequate.

See Transcript of Proceedings of Nov. 7, 1990, at 8-9.

Murphy's motions to intervene, whether permissive or as a matter of right.

An examination of the other three factors – which are reviewed *de novo* if the intervention is of right – might arguably be more favorable for Mr. Murphy than is timeliness. Success on any or all of these factors does not trump untimeliness, however. *See Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985), *cert. denied*, 474 U.S. 980 (1985) (stating that the failure to establish one of the four elements requires denial of the motion to intervene). As a result, even if the jurisdictional defect did not obviate this inquiry, Mr. Murphy has failed to demonstrate that the district court erroneously denied his motions to intervene.

III.

Because we lack appellate jurisdiction to consider Mr. Murphy's appeal of the denial of his motions to intervene, and because Mr. Murphy lacks standing to challenge the district court's other rulings, the appeal is DISMISSED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 12, 1991

July 8, 1991.

Before

Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

B. H., C. H., J. E., *et al.*,
Plaintiffs-Appellants,

and

PATRICK T. MURPHY,
Proposed Intervening Plaintiff-Appellant,

No. 91-2107 v.

SUSAN S. SUTER, DIRECTOR OF THE ILLINOIS DEPARTMENT OF CHILDREN & FAMILY SERVICES,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 88 C 5599
John F. Grady,
Judge.

Order

Susan Tone Pierce filed this class action seeking better care for children in the custody of Illinois' Department of Children and Family Services. More than two years after the commencement of the case, Patrick Murphy, the Public Guardian, filed a motion under Fed. R. Civ. P. 24 seeking leave to intervene. The district court denied this motion on November 7, 1990.

Murphy did not appeal, although entitled to do so to the extent he claimed intervention as of right under Rule 24(a). Instead he sought to amend his complaint in another case, *K.H. v. Suter*, No. 87 C 9833 (N.D. Ill.), to raise the contentions he sought to present by intervention in this case. The district court in *K.H.* declined to allow the amendment, and Murphy then filed a second motion to intervene in this case. This motion presented no facts, and made no arguments, that were unavailable last fall. When the second motion was called for argument, Mr. Murphy's sole statement to the court was: "We have nothing to say." The district judge denied this motion without comment, and Murphy has filed a notice of appeal.

This appeal comes too late. The time limits for filing notices of appeal apply to interlocutory as well as final decisions. A party may not file a belated motion for reconsideration – or, what comes to the same thing, a second identical motion – in order to obtain appellate review after the time to appeal the initial order has expired. Rather, the party must wait until the end of the case and appeal from the final decision. *Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990). See also *People Who Care v. Rockford Board of Education*, 921 F.2d 132, 134 (7th Cir. 1991); *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1239 (7th Cir. 1990).

Murphy contends that changed circumstances justify his second motion and belated appeal. If there were such circumstances, he should have presented them to the district court, creating a record that could be the basis of an appeal. Murphy did not do so. Arguments presented for the first time in papers filed with this court are

insufficient, even if there is a "changed circumstances" exception to the rule of *Weir* – a subject we do not pursue.

This case is close to either settlement or trial. Appeal at this late date would derail the entire case. Murphy had an opportunity to obtain seasonable appellate review. Having bypassed that opportunity, he cannot insist that the entire litigation now conform to his schedule.

The appeal is dismissed for want of jurisdiction.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, JUVENILE DIVISION

IN THE INTEREST OF:	)	
Crystal G. and Saunya G.,	)	NO. 86 J 00324
	)	86 J 11198
Minors.	)	

ORDER

THIS MATTER COMING to be heard on the amended motion of the court-appointed attorney and guardian *ad litem*, the Cook County Public Guardian, Patrick T. Murphy, for instructions from the Court as *parens patriae*, the court having reviewed the pleadings of the Public Guardian and of the Department of Children and Family Services and the court having heard argument of counsel for DCFS, counsel for the ACLU and the Public Guardian,

IT IS HEREBY ORDERED that this court, pursuant to its *parens patriae* power, directs its appointed attorney and guardian *ad litem* for the wards of this court, the Cook County Public Guardian, to ask the Honorable John Grady, of the United States District Court, Northern District of Illinois, who is assigned to the case of *B.H. et al. v. Suter*, No. 88 C 5599, to:

A. Include a provision specifying that nothing in the decree is meant to preclude state court judges from exercising their inherent judicial responsibilities over wards of the court as a class or in any other way.

B. Specify that the consent decree is not meant to preclude the attorney and guardian *ad litem* appointed by the Juvenile Court of Cook County from taking any

action which he believes is necessary to protect the interests of his clients against DCFS on an individual, group or class basis, or in any other way.

C. Limit the broad language at pages two, nine and ten, which attempts to summarize the relief in the decree, to clarify that the decree resolves all issues pertaining solely to the internal bureaucracy of DCFS, which are within the executive authority of DCFS, but does not attempt to usurp the authority of the state court to supervise the actions of DCFS, as court-appointed guardian.

D. Clarify that the decree is not meant to limit plaintiffs from seeking systemic relief against DCFS in any state or federal court on issues which are not specifically resolved in the consent decree.

IT IS FURTHER ORDERED that this court's ruling on the Public Guardian's amended motion for instructions from the court as parens patriae is a final order, and this court finds that there is no just reason for delaying enforcement or appeal of this order.

PATRICK T. MURPHY
COOK COUNTY
PUBLIC GUARDIAN
1112 South Oakley Boulevard
Chicago, Illinois 60612
(312) 633-2500

9/30, 1991

Enter:
A. N. Hamilton
Judge